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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JOHNNY H. et al., Persons Coming  
Under the Juvenile Court Law.

B157216  
(Los Angeles County  
Super. Ct. No. CK45696)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

COONG H.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Brian Petraborg and Irwin H. Garfinkle, Juvenile Court Referees. Affirmed.

Tyna Thall Orren, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, and Jerry M. Custis, Deputy County Counsel, for Plaintiff and Respondent.

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## ***SUMMARY***

A father appeals from a disposition order specifying suitable placement for his three children (they were placed with a paternal uncle and aunt) on the sole ground that the Department of Children and Family Services (DCFS) and the dependency court failed to consider placement with other relatives who he says would facilitate, rather than thwart, reunification. (Welf. & Inst. Code, § 361.3 [all undesignated statutory references are to the Welfare and Institutions Code].) We affirm.

## ***FACTUAL AND PROCEDURAL SYNOPSIS***

In June 2001, DCFS detained Johnny H. (then 15), Jackie H. (14) and Annie H. (11) and filed a supporting petition based on reports that their father Coong H. had sexually abused Jackie and Annie; that an aunt's boyfriend had placed his penis in Jackie's mouth; that the three children told their mother Cathy Y. of all of these incidents but she did not believe them; that Cathy had punched Annie in the mouth causing bleeding and swelling; that Cathy threatened the children with a screwdriver and that Coong threatened them with a tennis racket.

The siblings were placed with their paternal uncle Phillip H. and aunt Jane H. in El Monte where they had already been living for much of the preceding three years. The children did not want to return to their parents home (in South El Monte). Jane said she loved Johnny, Jackie and Annie, believed them and wanted to protect them. Phillip found it difficult to comprehend that Coong and Cathy could abuse their children but was willing and able to provide care and protection. Coong denied the sexual molestation and said Jane was using the children against him because she wanted his daughters to help her with housework.

At the time of the detention hearing, Coong identified four family members present in court he said were "all interested and wish to be considered as possible placements for the[] children." They were Coong's father (Fuong Dong H.) and Coong's

three sisters (Helen W., Elaine Q. and Kim H.). When Coong's counsel said that Phillip and Jane might have too many people living in their home, the court observed that DCFS had placed the children there. Coong's counsel said if DCFS did not find it necessary to change the children's placement, the relatives were interested in visitation.

Cathy's counsel said Phillip and Jane's home was "not a good environment for the children to be living in because it just exacerbates the animosities of the adults." She said Phillip and Jane were not "well-regarded by the rest of the family," the sisters did not get along with them, there was "constant strife and stress among the family" with them and the "charges were precipitated out of this unfortunate environment in which the adults have been acting and reacting to one another."

When the court asked what the children wanted, their counsel responded that there was "plenty of room" at Phillip and Jane's, and the children "fe[lt] comfortable" with them but emphasized "[t]hey don't want any contact with these relatives that are in court today." (Italics added.) Citing "threat[s] and intimidat[ion]" by these relatives, the children requested a restraining order against them. The dependency court ordered the children detained in their current placement with monitored visitation for Coong and Cathy; the court specified that the relatives could only visit after contacting the social worker and if the children consented.

In August, DCFS filed an amended petition alleging that Cathy had struck Annie numerous times, including hitting her in the mouth with a closed fist; Coong had sexually abused Jackie, including fondling her breasts and buttocks; their Aunt Kim's boyfriend had sexually abused Jackie by having her orally copulate him; Cathy repeatedly threatened to harm the children with a screwdriver; Coong threatened to kill the children; and Coong and Cathy each failed to protect the children from the other (among other grounds).

At that same time, the children requested and the court granted a temporary restraining order against Coong and Cathy as well as the three paternal aunts. (Coong and Cathy's visitation was suspended.) According to Jane's supporting declaration, after the last court appearance, Coong, Cathy, these aunts and additional relatives had repeatedly

threatened the children with physical harm and had threatened her with death if they did not “keep quiet.” The restraining order was later recalled on procedural grounds as to the paternal aunts, but the court ordered them “not to have contact” with the children as long as the children did not want contact with them.

Later, Coong filed a motion for the children’s removal from Phillip and Jane’s home on the ground that Phillip had a prior felony conviction, and the court ordered DCFS to conduct an investigation. According to DCFS’s report, Phillip had a 1996 conviction for making false statements in connection with an auto repair for which he was placed on three years probation.<sup>1</sup> (Health & Saf. Code, § 44059.) Because Phillip’s criminal record was not related to child abuse or endangerment and because the children were doing so well with Phillip and Jane, DCFS requested and obtained a criminal records exemption (§ 361.4, subd. (d)(2)) and recommended the children’s continued placement. The court did “not find any good cause” to remove the children from Phillip and Jane’s home.

From November 2001 to January 2002, the dependency court conducted a trial on jurisdiction issues, receiving evidence and hearing extensive testimony from the three children, their parents, Jane and Phillip, two of the paternal aunts (Kim and Helen), law enforcement officers to whom the children had reported their abuse and social workers involved in the case.

The children explained that, for two or three years before they disclosed their parents’ abuse and were detained, they lived primarily with Jane and Phillip, staying with their parents only at night. Coong would take them to school. After school, they would go to Jane and Phillip’s auto repair shop and then to Jane and Phillip’s home for dinner. Around 10:00 p.m., Coong or Cathy would pick them up and take them home. They

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<sup>1</sup> According to Phillip, he had hired a smog check manager whose license had expired. Phillip allowed the manager to use his license to pass a car that had actually failed the smog test. He said he had made a one-time mistake and would not do it again.

spent weekends with Phillip and Jane. During the summer, they went home only once or twice a week.

Jackie testified that, on one occasion, when Coong came in to wake her for school, he stroked from her stomach up to feel her breasts. Another time, he rubbed her “butt” while she was brushing her teeth. When Jackie told Cathy, she called Jackie a liar. Johnny also saw Coong “staring at [Jackie’s] butt.” When Johnny asked him why, Coong just smiled. When Johnny asked Cathy why she would not believe Jackie, Cathy said, “Who cares?”

Jackie also described waking one night on a couch in her grandparents’ house to find her Aunt Kim’s boyfriend Jonathan placing his penis in her mouth. She told her parents on the way home that night, but they told her to “stop lying.” They said if she told anyone else, they would put her in a foster home.

In addition, there was testimony that, on two occasions, Coong had laid on top of Annie, moving up and down, and she felt his penis to be hard. When Annie told Cathy, she said, “Stupid, why did you go in there . . . ?”

Jackie said she saw her mother have sex with one of her boyfriends at her parents’ home and that her parents had boyfriends and girlfriends outside their marriage.

On one occasion, when Coong was driving with the three children as passengers, Johnny asked Coong why he was touching Jackie and Annie, Coong said, “Shut up or . . . I’m going to kill you guys.” He said he was not afraid to go to jail and started swerving the car. Johnny thought he was going to die.

According to the children’s testimony, Cathy had also punched Annie in the mouth, causing bleeding, and had poked the children in the face with her long fingernails, causing scratches. When asked for money for karate, Cathy came at the children with a screwdriver. Coong had come after Jackie with a tennis racket and she was cut as a result.

At the conclusion of the trial, in sustaining the petition as to the allegations summarized here, the dependency court commented that it had “observed the demeanor” and “judge[d] the credibility of each and every witness” and found that each of the adult

witnesses had given inconsistent testimony.<sup>2</sup> The children had been “slow” to disclose the alleged abuse (particularly the incident with Kim’s boyfriend Jonathan) and more detail came out with each successive interview, but when they did start to disclose their abuse, “except for Phillip and Jane, they were told by all the adults in their life to keep quiet or bad things would happen to them.” Further, law enforcement officers had “rebuffed the children when they made their disclosures.”

“It has been argued that there was a monetary advantage to Phillip and Jane to induce the children to make false accusations. There was no evidence presented to this court that Phillip or Jane got any monetary gain whatsoever assuming the responsibility of care of these children. [T]he testimony has been that they’re the ones that are paying for maintenance and upkeep of the children since . . . the children started living with them.

“It’s been argued that this is really an issue of power, that Jane and Phillip want the children for their own and want to take the children away from their parents. [¶] There was no evidence presented to this court that there [were] any serious family feuds or dysfunctions, and I’m talking about the extended family now, the aunts and uncles, before the accusations or allegations were made by the children. [¶] Once the children started to disclose, then the family started to fall apart really and became very dysfunctional. . . .

*“The bottom line for the court is, as a matter of fact, I believe[d] the children when they testified before me in this court as to what happened to them.”* (Italics added.)

In its report for the disposition hearing (recommending “suitable placement”), DCFS informed the court that none of the relatives Coong had submitted as prospective placements (his father Fuong and his three sisters Helen, Elaine and Kim) had California criminal or child abuse histories. Johnny, Jackie and Annie all wanted to stay with Jane and Phillip and did not want to see Coong or Cathy. The children’s therapists

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<sup>2</sup> The allegation regarding Jonathan was amended to reflect that Jonathan had placed his penis in Jackie’s mouth (deleting the reference to oral copulation).

recommended against visitation, “monitored or otherwise.” All three “reported feelings of security and happiness living with their Aunt Jane . . . and Uncle Phillip. They continued to express feelings of fear and anger towards their parents *and the other relatives who didn’t trust []or protect them. They have also indicated feeling intimidated and threatened by them.*” (Italics added.)

At the February disposition hearing, the dependency court declared the children dependents and placed them in DCFS’s care “for suitable placement.” DCFS was further ordered to provide reunification services but no visitation for Coong with either Jackie or Annie.

Coong appeals.<sup>3</sup>

## ***DISCUSSION***

### **The Dependency Court Did Not Abuse Its Discretion in Ordering Suitable Placement for the Children.**

According to Coong, “[w]hile the court did not expressly state in its dispositional order that the children should remain placed with Phil[ilip and Jane . . . , it had twice approved that specific placement over the objections of the parents . . . , and it is to be inferred the court intended for the children to remain there.” Consequently, he says, the disposition order must be reversed because the dependency court abused its discretion in failing to consider placing the children with relatives who would facilitate, rather than thwart, family reunification.

Coong relies on subdivision (a) of section 361.3 which provides: “In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the

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<sup>3</sup> Cathy also appealed but has now abandoned her appeal.

child for placement of the child with the relative.”<sup>4</sup> Under subdivision (a), in determining whether placement with a relative is appropriate, the county social worker and the court “shall consider, but shall not be limited to, consideration of all the following factors:” (1) the best interest of the child; (2) the wishes of the parent, relative and child, if appropriate; (3) the requirement that foster care placement be made in the home of a relative if possible; (4) placement of siblings in the same home if in the best interest of each child; (5) the good moral character of the relative and any adult living in the home, including any history of violence, child abuse or neglect; (6) the nature and duration of the relationship between the child and relative and the relative’s desire to care for the child; (7) the relative’s ability to (A) provide a safe, secure and stable environment; (B) exercise proper and effective care and control of the child; (C) provide a home and the necessities of life for the child; (D) protect the child from his or her parents; (E) facilitate court-ordered visitation with the parents; (F) facilitate visitation with the child’s other relatives; (G) facilitate implementation of all elements of the case plan; (H) provide legal permanence for the children if the plan fails; (I) arrange for appropriate and safe child care as necessary and (8) the safety of the relative’s home. (§ 361.3, subd. (a), italics added.)

Focusing on just one of these 16 criteria, Coong says the dependency court prejudicially erred in failing to evaluate each of the relatives on the basis of his or her ability to facilitate reunification (§ 361.3, subd. (a)(7)(E)) and further failing to fulfill its statutory mandate under subdivision (e) which specifies: “If the court does not place the child with a relative who has been considered for placement pursuant to this section, the court shall state for the record the reasons placement with that relative was denied.” We disagree.

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<sup>4</sup> “‘Preferential consideration’ means that the relative seeking placement shall be the first placement considered and investigated.” (§ 361.3, subd. (c)(1).) However, “[i]n any case in which more than one relative requests preferential consideration pursuant to this section, *each relative shall be considered under the factors enumerated under subdivision (a).*” (Italics added.)



Assuming the order for suitable placement effectively meant continued placement with Phillip and Jane instead of Coong's other relatives in light of the record, although the dependency court did not specifically state its reasons for maintaining this placement, any error in failing to specify these reasons was harmless. In the analogous context of cases involving a court's obligation to make findings regarding a child's change of custody, courts have held that the failure to do so will be deemed harmless where "'it is not reasonably probable such finding, if made, would have been in favor of continued parental custody.'" (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218.)

Here, although Coong cites the facilitation of reunification factor, "the 'best interests of the child' is the lynchpin of the analysis." (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1068.) "It is that principle—the minors' best interests—which underlies the decision the court must make under section 361.3." (*In re Luke L.* (1996) 44 Cal.App.4th 670, 680.) According to evidence presented to the dependency court, all of Coong's relatives supported Coong and said Jane was behind the children's allegations. *Contrary to the express findings of the dependency court, none of them believed the children.* Indeed, the court issued first a restraining order and later a protective order against Helen, Kim and Elaine because of their threats to beat up the children and to beat Jane to death after the first court appearance in this matter. Kim, Jonathan's girlfriend at the time he molested Jackie, called Jackie a liar when she disclosed what had happened and told Jane not to talk about the incident because the family owed him too much. Helen and Kim said that what Coong had done to Annie was "not . . . anything bad." Helen told Coong and Cathy to take the children "by force if necessary." Coong's father and sisters pressured Phillip not to testify against Coong and to return the children to Coong and Cathy.

The children specifically reported feeling angry toward and fearful of their relatives other than Phillip and Jane who had neither trusted nor protected them but instead had threatened and intimidated them. In stark contrast to their relationship with the other relatives, they felt safe and happy with Phillip and Jane and had lived with them for years. On this record, considering the factors enumerated in section 361.3,

subdivision (a), and with the best interests of the children underlying its decision, it is not reasonably probable that the dependency court would have ordered a change in the children's placement; Coong has failed to demonstrate an abuse of discretion. (*In re Robert L.*, *supra*, 21 Cal.App.4th 21 Cal.App.4th at p. 1067.)

***DISPOSITION***

The order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

MUÑOZ (AURELIO), J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.